United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1142

To be argued by
IRA H. BLOCK

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1142

UNITED STATES OF AMERICA,
Appellee,

—v.—

RALPH BROWN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

IRA H. BLOCK,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

PAGE

OTHER AUTHORITIES CITED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1142

UNITED STATES OF AMERICA,

Appellee,

—v.—

RALPH BROWN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ralph Brown appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 17, 1976 after a four day trial before Honorable Irving Ben Cooper, United States District Judge, and a jury.

Indictment 75 Cr. 1126, filed November 20, 1975, contained two counts. Count One chraged Ralph Brown and one Arthur John Smith, a/k/a "Kayo", with conspiring to distribute, and to possess with intent to distribute, Schedule I narcotic drugs in violation of Title 21, United States Code, Section 846. Count Two charged Brown and Smith with the substantive offense of distributing and possessing with intent to distribute approximately one ounce of heroin in violation of Title 21, United States Code, Section 841(b)(1)(A).

Trial commenced on February 2, 1976 and continued through February 5, 1976, when the jury found Brown guilty of the Count One conspiracy charge and acquitted him of the substantive offense charged in Count Two of the indictment.*

On March 17, 1976 Brown was sentenced by Judge Cooper pursuant to 18 U.S.C. § 3651 to a term of twelve years' imprisonment, execution of all but six months of which was suspended, to be followed by concurrent periods of five years probation and three years special parole. Judge Cooper also ordered Brown to pay a $5,000 fine according to the directions of the Probation Department.

Statement of Facts

The Government's Case

The Government's case against Brown arose out of a narcotics investigation conducted by Special Agents of the Drug Enforcement Administration. During the investigation, Carliese Gordon, a DEA Special Agent acting in an undercover capacity, and an informant, Morris Davis, went to Thelma's Lounge at 148th Street and Seventh Avenue in Manhattan on January 14, 1975 to purchase narcotics as a result of prior conversations between Davis and appellant Ralph Brown. (Tr. 21-23, 149-55).** On that day Davis and Agent Gordon arrived by car at Thelma's Lounge at about 6:30 P.M. (Tr. 23-24). Davis went into the bar while Agent Gordon remained outside in the car. Thereafter Davis re-

---

* Arthur John Smith pleaded guilty to the conspiracy charge after the opening of trial as to his co-defendant Brown. Count Two was ordered continued open as against Smith on March 17, 1976 when Judge Cooper imposed a ten-year suspended prison sentence, five years' probation and a $3,000 fine on Count One.

** "Tr." refers to the trial transcript.

turned to the car with two men whom he introduced to Gordon as "Ralph" (Brown) and "Kayo" (Smith). The quartet took seats in the auto—Davis and Gordon in front, Brown and Smith in back. (Tr. 28). Brown then instructed Davis to drive to 138th Street between Lenox and Seventh Avenues. (Tr. 29). Upon arriving there, Brown told Davis and Gordon he would be back in five minutes, left the car and walked east on 138th Street and then south on Lenox Avenue. (Tr. 29, 159).

Brown returned to the car after a five to ten minute absence and told Gordon that one ounce of heroin which could take a "five cut" would cost him $1,400. (Tr. 35-36). Brown asked Gordon for the money, which Gordon refused to advance. Brown protested that his "guy" would not do business other than "cash up front". (Tr. 36-37). Gordon excused himself to make a phone call. When he returned three or four minutes later Brown was gone. (Tr. 37-38). In a short while Brown came back and directed Davis to drive to 144th Street and Lenox Avenue. Brown once again left the car. (Tr. 38-39). Agent Gordon, Davis, Brown and Smith drove to 144th Street and Lenox Avenue. When the automobile arrived there twenty minutes later, Brown re-entered the car, removed an aluminum foil package from his pocket and handed it to Davis. In turn Davis handed the package to Gordon. (Tr. 39-40). Gordon paid Brown $1,400 in cash which Brown gave to Smith. When Gordon observed that the package seemed a little light, Brown reiterated that it was a full ounce of "five cut" heroin.* Then, after Gordon told Brown he might be back in a few days to buy two or three ounces, Brown proclaimed that he could handle up to one kilogram with no problem. (Tr. 40-41).

---

* The package contained 16.46 grams of a white powder which proved to be 17.1% pure heroin. (Tr. 40, 77-79; GX 2).

The next day, January 15th, Gordon and Davis met Brown and Smith in Thelma's Lounge and told them the package purchased the day before had been only three-quarters of an ounce instead of a full ounce. Brown responded by stating that he had sold the package to Gordon exactly as he had obtained it from his source. Then Brown volunteered that he had another connection who could supply heroin at $2,500 per ounce which was of superior quality in that it could take a "ten cut". (Tr. 45-46, 72-73). Brown offered to supply a sample anytime Gordon wished. (Tr. 47).

A little more than a week later, on January 23, 1975, Gordon drove up to Thelma's Lounge in an automobile and parked in front.* Soon afterwards Brown and Smith left Thelma's and entered Gordon's car. (Tr. 47-50). Brown told Agent Gordon he could get him "double stuff" at $1,400 an ounce that would take a five cut. Brown told Gordon to drive to Eighth Avenue and 149th Street. Brown, Smith and Gordon drove to that location where Brown left the car and entered the Peacock Bar.** (Tr. 49, 74-75). After the passage of about 45 minutes Brown returned. Brown told Gordon that "his people" only had half an ounce on hand but were expecting a larger package at 6:00 P.M. that evening. Gordon agreed to return at that hour, after which Brown left the car. (Tr. 50-51).

At approximately 6:15 P.M. on January 23rd, Agent Gordon met with Brown in an automobile parked at 148th Street and Seventh Avenue. Gordon was alone. Brown told him he would go check on whether the additional supply of narcotics had been received. Brown left the

---

* Gordon was alone on this occasion because Brown had told Gordon on January 15th that the next time he came to purchase narcotics he needn't come accompanied by Davis. (Tr. 166).

** Smith had previously left the car at 145th Street and Eighth Avenue at his request. (Tr. 49, 75).

car, walked west on 148th Street and then returned 10-15 minutes later, telling Gordon that the "main package" had been delayed. (Tr. 51-53). Brown added that he could take Gordon to another guy downtown who had heroin for sale at $1,400 an ounce that would take a five cut. Brown further explained that this person was the same source who had supplied him with the package of heroin he had sold to Gordon on January 14th. (Tr. 53). After Gordon said he didn't want to deal with that source, Brown told Gordon to obtain his phone number from Morris Davis should Gordon want to contact Brown thereafter, and he then left the car. (Tr. 53-54).

In addition to the foregoing testimony of Agent Gordon, during the Government's case-in-chief Special Agent Michael Cunniff testified to surveillance of Thelma's Lounge and environs maintained by him on January 14, 15 and 23, 1975. (Tr. 66-77). For its rebuttal case, the Government called the informant, Morris Davis, who testified concerning his brief telephone calls with Ralph Brown prior to January 14th and his visits with Brown and Smith in Thelma's on January 14th and 15th. (Tr. 149-225). Davis' testimony was in all respects consistent with that provided by the Government's other witnesses.

The Defense Case

Defendant Brown testified in his own behalf, and was the defense's only witness concerning the events of January 14th, 15th and 23rd.* In substance, his testimony was that when he visited New York City in January of 1975 he had received a phone call from the informant,

* At the conclusion of Brown's testimony the defense rested. The Government then called the informant, Morris Davis, as a rebuttal witness, after which the defense called Randolph Hinds in surrebuttal. Hinds' testimony related exclusively to the circumstances surrounding the service of a defense subpoena on Davis on the eve of trial.

Morris Davis, an old friend of his. (Tr. 90). Morris asked Brown to get him a "package" so that he could obtain enough money to invest in a bar business. Brown told Morris that he was "out of it" and that he didn't want "to get involved." (Tr. 90-93). Morris called again the next day and invited Brown to meet the man with whom Davis was going to be "partners" in the bar. Brown agreed to meet them at Thelma's Lounge which was across the street from where Brown was living. Sometime in the evening of January 14th or 15th, Brown met Morris Davis inside Thelma's. Brown and Davis left the bar and entered a parked automobile where Brown was introduced to Agent Gordon.

Brown testified on direct examination that after an appeal to friendship by Davis he agreed to assist Davis and Gordon in purchasing narcotics. (Tr. 97-99). Thereafter Brown admitted to obtaining a package of heroin from an unnamed fellow that he knew years ago and selling it to Davis and Gordon for $1,400. (Tr. 99-102).

Concerning the post-January 14 contacts about which the Government's witnesses testified, Brown claimed that when approached by Gordon (and perhaps Davis as well) in Thelma's in the latter part of January about the package being "short," he realized they weren't going to leave him alone. Because he was only going to remain in New York for a short period of time he decided to play along with Gordon and Davis until he left New York. (Tr. 102-04). Brown told them he could get further quantities of more potent heroin although, supposedly, he had no intention of doing so. (Tr. 105). Brown denied ever receiving, other than as a conduit for transmittal to the ultimate recipient, any money, narcotics or favors for his participation in the narcotics transactions. (Tr. 105).

Although Brown made no mention of his co-defendant Arthur John Smith, a/k/a "Kayo," in his direct testimony,

on cross-examination acknowledged introducing Kayo to Morris Davis during their first meeting in Thelma's Lounge. (Tr. 116). Brown further explained that although he had known Kayo for many years, he had never done any narcotics deals with him and that Kayo was "absolutely a victim of circumstances" in that Kayo just innocently happened to be in Brown's company during Brown's narcotics transactions on January 14, 15 and 23. (Tr. 116-18). Brown also stated on cross-examination that he had come up to New York from his home and family (including seven children) in Atlantic City in early January, 1975 to render assistance to a girl friend whose house had burned down. (Tr. 109-10).

Brown acknowledged that his pre-January 14 telephone conversations—during which the importuning by Davis was supposed to have occurred—lasted no more than a few minutes each. (Tr. 116). Nevertheless, he agreed to obtain narcotics for Davis and Gordon and, in an effort to do so, took a "potshot" and went to a building on 139th Street to see a friend he hadn't seen in years. (Tr. 120). Brown's "friend" was there and had narcotics for sale. Brown successfully negotiated with this friend for a package of heroin, which he ultimately sold to Gordon. (Tr. 121). Brown declined to disclose the identity of his friend, claiming that he "would be a dead man if he did so." (Tr. 121).

The Court's Supplemental Charge

After approximately two and one-half hours of deliberation on February 4, 1976, the jury sent the following note to the Court:

> "Is entrapment a defense for conspiracy? I.e. if we feel there was entrapment, does it necessarily follow that we must acquit on conspiracy since no partnership would have been formed were it not

for this 'deal'. Are these charges completely separate?" (Tr. 364-65).

The Court asked the jury to re-write the note to make clear the reference intended by use of the word "deal." (Tr. 367-71). In requesting the jury to define "deal," the Court answered the query contained in the last sentence of the note by stating that the conspiracy charge and the substantive count were separate offenses and that it was the jury's responsibility to render a verdict as to each. (Tr. 369-71). Defense counsel objected to this partial response, as he had to the Court's earlier suggestion that the jurors be asked to clarify their use of the word deal. (Tr. 365-66, 371-72).

Before being excused from further deliberations that day by Judge Cooper the jury returned a note explaining that what they had meant by "deal" was the "initial conversation between Morris and Brown." (Tr. 372). After this the Court asked the attorneys for both sides to consider the matter that evening and to report their views on what response, if any, to make to the jury's notes the following morning. (Tr. 373).

The next morning, February 5, 1976, the Government responded that the jury appeared to have misapprehended the Court's instructions on entrapment and requested that the jury receive additional instructions on this subject. In particular, the Government suggested that it be explained to the jury that their consideration of Brown's entrapment defense required them to undertake a three-part analysis: (1) was there inducement by a Government agent; (2) as a factual matter what was the inducement; and (3) whether this inducement was overborne by the Government's proof of the defendant's previous disposition to do that which he was induced to do. (Tr. 375-76). The Government further suggested that the jury should be

instructed that they were to consider each count separately and apply the defense of entrapment, if applicable, to each count separately. (Tr. 376-79).

In response the defense attorney stated that inasmuch as the conspiracy and substantive counts both arose out of the January 14th activities, the defense of entrapment applied to both counts equally, suggesting that if the jury believed Brown's entrapment defense, their verdict should be not guilty as to each count. (Tr. 380-81).

After additional colloquy with counsel (Tr. 381-92), Judge Cooper recalled the jury and delivered a supplemental charge on entrapment responding to the jury's notes. The Court added to its original instructions on the subject in three respects. First, the jury was told that entrapment was a defense applicable only if a defendant does not deny the doing of the act with which he is charged. (Tr. 392-93). Concerning this aspect of the defense, Judge Cooper explained that, at least as to the conspiracy count, it was for the jury to determine the predicate question of whether or not Ralph Brown had denied conspiring to violate the federal narcotics laws. (Tr. 393). Second, the jury was also advised that in evaluating the entrapment defense, should they find it applicable, they were to consider the entire trial record and make their determination on the totality of the evidence. (Tr. 394). Finally, the jurors were once again counseled that although entrapment had been raised by Brown as a defense to both counts, their task was to evaluate the defense separately on each count with regard to all of the evidence introduced at the trial. (Tr. 396). Upon completion of these additional remarks Judge Cooper inquired of the jurors individually to be certain that they had understood his most recent instructions and that the jurors' inquiries contained in the first note had been satisfactorily answered. (Tr. 396-99). The jury then resumed their deliberations, returning approximately two

and one-half hours later with a verdict finding defendant Ralph Brown guilty on Count One (the conspiracy charge) and not guilty on Count Two (the substantive offense).

ARGUMENT

POINT I

The trial court's supplemental charge on entrapment was correct and fairly presented Brown's theory of defense.

Brown's first claim is that a supplemental charge by the District Court on the issue of entrapment, in response to a note from the jurors, deprived him of a fair trial. This claim is based solely on a reading of the supplemental charge out of the context of the proof at trial and of the instructions as a whole, and is utterly without merit.

In his principal instructions to the jurors, the trial court charged the jury on entrapment (Tr. 352-56) in substantially the form that had been requested by defense counsel, and to which the Government had consented. (Tr. 241-48). Counsel for Brown explicitly stated that he had no exceptions to the charge. (Tr. 362). Thereafter, when a note was received from the jury regarding the entrapment defense, the Court supplemented its charge. (Tr. 392-96). In response to the jury's note (Court Ex. 2; Tr. 364-65), Judge Cooper instructed the jury that the conspiracy as charged in Count One and the substantive offense as charged in Count Two were to be considered by them separately and that all of the elements of each charge had to be proved by the Government beyond a reasonable doubt before the defense of entrapment came into play as to either count. (Tr. 369-70, 394-96). In addition, Judge Cooper explained to the jurors that the policy of the entrap-

ment defense was, in effect, one of confession and avoidance, *i.e.*, "I did do all those steps that spell out the doing of a crime but" "I am released under the law." (Tr. 385, 393). This supplemental charge was both correct as a matter of law and entirely consistent with the theory of defense and with the evidence introduced at trial in support of that theory.

In his trial testimony Ralph Brown freely admitted having sold a package of heroin to Agent Gordon for $1,400 on January 14, 1976. However, this admission was laced throughout with Brown's protestations that the sale occurred only because of the inducement by Davis prior to the sale. Accordingly, Brown's defense to the substantive count was the standard species of entrapment. Similarly, with respect to the conspiracy count, counsel for Brown argued to the jury in summation (Tr. 267, 270-72) and expressly stated in colloquy with the Court and opposing counsel (Tr. 373, 381) that Brown was released from any criminal responsibility for all of his acts because he had been entrapped in that, according to the defense, all that Brown did about which the jury heard testimony was the product of his reluctant willingness to return a favor to his old friend and "cousin," Morris Davis. Indeed at one point defense counsel even requested the Court to instruct the jury that the defendant had raised entrapment as a defense to both counts of the indictment. (Tr. 392).* Significantly, however, during his testimony

---

* The contention that Brown's defense to the conspiracy count was not entrapment but rather lack of intent (Brief, p. 17) is simply not borne out by the trial record. Nor can Brown properly say that because the jury was urged to conclude that the January 14th transaction was the product of unlawful entrapment, they should have been instructed that if they so concluded Brown should be acquitted of the conspiracy count as well. There was considerable other evidence in the case from which the jury could have inferred — as they apparently did — that

[Footnote continued on following page]

Brown was totally silent as to the participation by his co-defendant Smith—the only named co-conspirator alleged in the indictment—in the narcotics transaction and during cross-examination sought to exculpate Smith of any responsibility, denying that he was other than innocently present in Brown's company during the events of January 14, 15 and 23 and gratuitously characterizing him as "absolutely a victim of circumstances". (Tr. 117). Compounding this apparent denial of the requisite plurality of actors essential to a conspiracy charge, Brown refused to identify on the witness stand the person from whom he had obtained the narcotics.* (Tr.

Brown conspired with Smith. Of course, in their consideration of whether or not either Brown or Smith performed an overt act in furtherance of the conspiracy, the jurors were not limited to the four overt acts set forth in the indictment, all of which related to the events of January 14, 1975. *See United States* v. *Cohen*, 518 F.2d 727, 733 (2d Cir.), *cert. denied, sub. nom. Duboff* v. *United States*, 423 U.S. 926 (1975); *United States* v. *Fassoulis*, 445 F.2d 13, 19 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *United States* v. *Armone*, 363 F.2d 385, 400 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966). Finally, Brown's claim that the jury should have been instructed that "they could not consider that [January 14th] transaction in finding a conspiracy if they found that Brown was entrapped into participating in the transfer" (Brief, p. 17) totally misunderstands the nature of the entrapment defense, which is concerned not with the admissibility of evidence but with criminal culpability. The jury was clearly entitled to conclude that Brown may have been entrapped into the January 14th sale, *but by thereafter continuing to deal with the undercover agent without additional importuning demonstrated his predisposition to conspire*. Indeed the jury heard evidence from which they quite reasonably may have determined that the occurrences after January 14th were the product of Brown's own solicitations in an effort to "drum up" business (Tr. 41, 160-61), and they were urged to so find. (Tr. 258-59).

* While perhaps ingenious, the argument in appellant's brief (p. 17n-18n) that Brown of necessity admitted the offense of conspiracy by acknowledging obtaining the drugs from a source who was one of those "others to the Grand Jury unknown" is

[Footnote continued on following page]

121). In this posture, then, the trial judge quite properly advised the jury in his supplemental charge that it was for them to determine if Brown denied conspiring with anyone to violate the narcotics laws, and that if they did find such a denial on the totality of the evidence, to reject the entrapment defense as to the conspiracy count. Brown's entrapment defense was integrally bound up with his credibility as a witness, and thus the jury was certainly entitled to consider on the issue of whether Brown had been entrapped into committing the offense of conspiracy to violate the narcotics laws * the circumstance that he persisted in denying involvement in any narcotics deals with Kayo despite persuasive evidence to the contrary. *See, e.g.*, Tr. 83.

The question of "whether a defendant has the right 'both to deny the transaction and to urge that if the jury believed it did occur [that] the government's evidence as to how it occurred indicated entrapment' " [is] an open question in [this] Circuit." *United States* v. *Swiderski*, Dkt. No. 75-1422 (2d Cir., June 11, 1976).

---

unavailing. In the first place, this theory of agreement was never presented to the trial court or the trial jury. Moreover, the jury was not bound to accept Brown's statement that there was a so-called "old friend" who was the source of the drugs, especially considering Brown's refusal to identify this source and the direct conflict and inconsistency between Brown's testimony exculpating Smith and that from Agent Gordon, among others, placing Smith smack dab in the middle of a conspiracy with Brown. *See Masciale* v. *United States*, 356 U.S. 386, 388 (1958); *United States* v. *Pugliese*, 346 F.2d 861, 863 (2d Cir. 1965). Furthermore, the jury was entitled to consider the contrast between Brown's apparently vivid recollection of the events preceding the January 14th sale and his memory lapse as to subsequent acts and occurrences.

* The defense adduced no evidence that either Davis or Agent Gordon induced Brown to solicit the assistance of still other persons in obtaining narcotics, such as the second source he described to Gordon on January 15, 1975. (Tr. 45-46).

Slip op. 4147, 4156 n.4, *citing United States* v. *Alford*, 373 F.2d 508, 509 (2d Cir.), *cert. denied*, 387 U.S. 937 (1967); *United States* v. *Braver*, 450 F.2d 799, 802 n.7 (2d Cir. 1971), *cert. denied*, 405 U.S. 1064 (1972); *United States* v. *Licursi*, 525 F.2d 1164, 1169 n.5 (2d Cir. 1975). However, in charging the jury that "a defendant's testimony to the effect that he did not commit the crime charged cannot raise an issue of entrapment" (Tr. 393), Judge Cooper was relying on *Sylvia* v. *United States*, 312 F.2d 145, 147 (1st Cir.), *cert. denied*, 374 U.S. 809 (1963). (Tr. 400). In *Sylvia* the Court of Appeals for the First Circuit ruled that a defendant who took the stand and testified in his own behalf that his participation as courier in a narcotics transaction was innocent because he lacked knowledge that the packages he delivered contained heroin was not entitled to an entrapment charge, particularly where the jury had been adequately instructed as to the knowledge and wilfulness elements of the crime. Citing, *inter alia*, this Court's opinion in *United States* v. *DiDonna*, 276 F.2d 956 (2d Cir. 1960), the First Circuit explained that:

> "The defendant's testimony was to a single, indivisible episode, and was either to be accepted or rejected in its entirety. The jury's verdict of guilty necessarily indicated its rejection." 312 F.2d at 147.

Likewise, in *DiDonna* this Court "similarly held . . . that the trial judge properly refused to instruct the jury on entrapment where 'the defendant himself testified that he did not know what was in the package which he admittedly delivered to the narcotics agent.'" *United States* v. *Swiderski*, *supra*, slip op. at 4156 n.4.

As in *Sylvia*, Ralph Brown's testimony as to the alleged entrapment was to a single criminal episode. To the extent that it was selective and self-serving by, at

first, omitting reference to "Kayo", Brown's partner in the criminal venture and, later, falsely exculpating Kayo of criminal responsibility, the jury was entitled to reject the remainder of his testimony concerning the conspiratorial activities occurring after the January 14th sale.

In any event, on this appeal Brown apparently has acquiesced in Judge Cooper's reliance on the rule that a defendant cannot claim both non-involvement and entrapment,* and does not ask this Court to re-examine the question left open in *Swiderski*, *supra*. Rather he claims that the supplemental instruction was somehow inconsistent with the belatedly expressed defense based on lack of intent and, in an unexplained fashion, precluded a finding of lack of intent by Brown as to events after January 14th. The simple and, in the Government's view, dispositive answer to this claim is that Judge Cooper fully instructed the jury in the main portion of his charge that they must find Brown to have acted knowingly and wilfully in order to find him guilty of either offense charged (Tr. 325-26, 330-32, 338-40), to which no objection was made. Thus, Brown's assertion that "the jurors could not find both that entrapment precluded a conviction based on the January 14 events and that lack of intent precluded a finding of guilt based on the later

---

* Judge Cooper's instructions to the jury in reliance on *Sylvia* v. *United States*, *supra*, were in accordance with the current case law of the Third (*Government of the Virgin Islands* v. *Hernandez*, 508 F.2d 712, 717 n.5, *cert. denied*, 422 U.S. 1043 (1975); *United States* v. *Watson*, 489 F.2d 504, 507 (1973)); Fifth (*United States* v. *Rodriguez*, 498 F.2d 302, 311 (1974); *United States* v. *Williamson*, 482 F.2d 508, 515 (1973)); Sixth (*United States* v. *Kilpatrick*, 477 F.2d 357, 359 (1973)); Seventh (*United States* v. *McCord*, 509 F.2d 891, 895, *cert. denied*, 423 U.S. 833 (1975); *United States* v. *Johnston*, 426 F.2d 112, 114 (1970) and Tenth (*United States* v. *Smaldone*, 484 F.2d 311, 322 (1973), *cert. denied*, 415 U.S. 915 (1974); *United States* v. *Gibson*, 446 F.2d 719 (1971)) Circuits.

meetings," (Brief, p. 18) is simply wrong, since the jurors were separately and correctly instructed on both entrapment and the requirement of intent.

Second, in arguing that the supplemental charge was defective, appellant's brief overlooks the fact that the supplemental charge was just that—a supplement to the initial charge on entrapment previously delivered by Judge Cooper. The two statements on entrapment cannot be separated for together they comprise the entirety of the Court's instructions on the subject in the context of which any claim of legal insufficiency must be viewed. When asked for objections or exceptions to the initial charge defense counsel, as Brown now concedes (Brief, p. 20), interposed none. (Tr. 362). Thus, it simply is not true, considering all of the facts and circumstances of the evidence presented during the trial, that the only basis upon which Brown could have been found guilty on the conspiracy count was due to jury misapprehension or misinstruction concerning entrapment. The testimony of Agent Gordon regarding his meetings with Brown after the sale of heroin on January 14th was corroborated by testimony from a fellow agent (Michael Cunniff) who conducted surveillance of Gordon's activities on January 14, 15 and 23, 1975 (Tr. 67-76) as well as by Davis. (Tr. 165-66). As noted earlier, the only evidence of "non-conspiracy" upon which the defense relied was the testimony of Brown himself. Here the jury was properly charged on the issue of credibility (Tr. 345-47) and on the possible interest of each of the witnesses. (Tr. 347). Resolution of the credibility issue was peculiarly within the jury's province (*United States* v. *Riley*, 363 F.2d 955, 958 (2d Cir. 1966)) and that they did so in a manner unsatisfactory to Brown is not a ground for reversal.

POINT II

The entrapment charge contained sufficient instruction on the Government's burden of proof.

Brown argues that in the entrapment charge the trial court failed to instruct the jury on the Government's burden of proof. This simply is incorrect. In discussing the entrapment defense with the jury during his charge-in-chief, Judge Cooper stated as follows:

> "Now, as to the burden of proof on the issue of entrapment. If you should find there is some evidence of enducement [sic], then the government has the burden of proving that such inducement was not the cause or creator of the crime. In other words, the government must prove that this defendant was ready and willing to commit the offense charged." (Tr. 356).

Additionally, both the Court's supplemental charge—concerned exclusively with the entrapment defense—as well as the main charge were replete with instructions that the Government must prove all elements of its case beyond a reasonable doubt. (Tr. 314-16, 326, 332, 337-38, 392-96). Indeed, the only references to burden of proof in either the main or supplemental charges was the constant reiteration of the Government's ultimate obligation of proving beyond a reasonable doubt each of the elements of the offenses. Furthermore, the jury was also generally instructed that the burden of proof that is on the Government never shifts through the trial and that the presumption of innocence, sufficient to acquit unless and until overcome by evidence of guilt beyond a reasonable doubt, remained with Brown throughout the trial and applied to the consideration of each of the elements of the offenses charged. (Tr. 314-15).

The overall impact upon the jurors of the instructions concerning Brown's entrapment defense was an appre-

ciation that in order to convict, if they found Brown had shown he was induced to engage in the narcotics transactions by Davis, then the Government was required to prove beyond a reasonable doubt that Brown was predisposed to commit the offenses charged and merely awaited favorably opportunity to do so. When examined as a whole (*see Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973); *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976); *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974)), the entrapment instructions did not mislead the jury as to the Government's burden of proof. Nor, contrary to the suggestion of appellant's brief (pp. 19-20), did the charge misplace the burden or misstate the quantum and nature of evidence necessary to sustain it.*

The law is quite clear that with regard to the defense of entrapment the defendant has the initial burden, though it is "relatively slight", of showing that the Government agent induced defendant to commit the crime. *United States* v. *Snyderski*, *supra*, Slip op. at 4152; *United States* v. *Henry*, 417 F.2d 267, 269 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970). Upon a showing of such inducement the burden of proof shifts to the Government to show predisposition—that the defendant was ready and willing, without persuasion and was awaiting any propitious opportunity to commit the offense. *United States* v. *Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952),

---

* While the better practice might have been to state once again the nature of the Government's burden of establishing predisposition, in the context of the charge as a whole the failure was one of emphasis rather than omission. Since the emphasis sought by Brown could easily have been supplied at his request, his failure to object at trial bars review in this Court. FED. R. CRIM P. 30; *United States* v. *Ingenito*, 531 F.2d 1174, 1177 (2d Cir. 1976). In any event, in his summation defense counsel had already made the jurors aware of the Government's obligation of establishing predisposition beyond a reasonable doubt. (Tr. 267).

most recently cited by this Circuit in *United States* v. *Swiderski*, *supra*, and *United States* v. *Licursi*, 525 F.2d 116 (2d Cir. 1975). The Government may discharge this burden of demonstrating propensity or predisposition in any one of three ways:

> (1) by showing an existing course of criminal conduct similar to the crime for which defendant is charged;
> (2) by introducing proof of an already formed design on the part of the accused to commit the crime of which he is charged; or,
> (3) by demonstrating a willingness to commit the charged crime as evidenced by the accused's ready response to the inducement.

United States v. *Viviano*, 437 F.2d 295, 298 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971), cited in *United States* v. *Anglada*, 524 F.2d 296, 298-99 (2d Cir. 1975). Once the evidence of inducement is contradicted by such proof of predisposition in whatever form developed, the burden shifts back to the defendant to challenge or contradict the Government's evidence. Should the Government's evidence of predisposition go uncontradicted, the trial court need not even submit the entrapment issue to the jury. *United States* v. *Anglada*, *supra*, 524 F.2d at 298.

Relying on this Court's decision in *Anglada*, appellant apparently contends that because there was no evidence of an existing course of conduct by Brown or an already formed design on his part, the Government's evidence of lack of reluctance was insufficient to carry the day. This is not the law. The Government may use any one of the modes of proof outlined in *Viviano* and *Anglada* and is not bound to show propensity through each kind of predisposition evidence.

The Government shouldered its burden of establishing Brown's predisposition through the testimony of Agent Gordon and Davis as to Brown's initial lack of reluctance to supply narcotics and his solicitation of

additional sales of better quality and larger quantities of heroin from different sources. Furthermore, despite his self-serving conclusory protestations of having rebuffed the alleged solicitation by the Government agents, on cross-examination Brown acknowledged that although he first spoke to Davis ever so briefly on January 13th, the illegal transaction nevertheless took place the next day. Finally, the evidence is replete with statements of Brown concerning his intimate knowledge of the heroin trade, such as indications of the "cut" a package could take. The sole evidence proffered to contradict the Government's evidence came from the mouth of defendant Brown. Although in his brief (p. 20) Brown characterizes his trial testimony as "very credible," this was precisely the issue that was tendered to the jury with proper instruction * and which the jury apparently resolved against Brown, at least as to the conspiracy count.

When viewed in the context of the entire record, it is apparent that the jury was properly instructed on all aspects of the law of entrapment, including the Government's burden of proof. The verdict reflected the jury's resolution of those factual matters which were contested and represented the jurors' collective assessment of the relative credibility of the witnesses. The jury was properly advised of their responsibility to render a separate verdict as to each count and that a finding of guilt or innocence as to one of the counts did not compel a like finding as to the other.** Accordingly, the jury's verdict should stand.

---

* In addition to the standard instructions on credibility of witnesses and a defendant's interest in the outcome of his case, at the request of defense counsel (Tr. 238-39) Judge Cooper delivered an informer's interst charge. (Tr. 351-52). *Compare United States* v. *Swiderski, supra,* Slip op. at 4517-58.

** It is difficult, at best, to understand Brown's argument that "[i]f the jurors believed that appellant Brown had not participated in the conspiracy by way of the later two meetings,

[Footnote continued on following page]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

IRA H. BLOCK,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

---

neither of which resulted in a transfer of drugs, the erroneous instruction here might have nonetheless produced a conviction on the conspiracy count." Brief, p. 20. If what is meant is that the jury could not have convicted Brown of conspiracy based upon the same proof as to the inducement-predisposition regarding the January 14th sale upon which they acquitted him, this clearly is incorrect since verdicts that may appear inconsistent are permissible. *E.g., United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Zane*, 495 F.2d 683, 690 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); *United States* v. *Maybury*, 274 F.2d 899 (2d Cir. 1960); *Dunn* v. *United States*, 284 U.S. 390, 393 (1932). If what is meant is that the entrapment charge was somehow defective or flawed, the claim is not only incorrect for the reasons stated in Point One, *supra*, but it is also contradicted by the statement earlier in Brown's brief (p. 19) that "the jury acquitted on the substantive count, and the jurors' note indicates that verdict was due to an acceptance of the entrapment defense."

IHB:isk
76-1142

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KYM-ANTOINETTE BOLLINGER being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of July, 1976, she served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Phylis Skloot Bamberger, Esq.
Federal Defender Services Unit
509 United States Court House
Foley Square
New York, New York 10007

And deponent further says that she sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Kym-Antoinette Bollinger
KYM-ANTOINETTE BOLLINGER

Sworn to before me this
12th day of July, 1976

IRA BLOCK
Notary Public, State of New York
No. 31-5248425
Qualified in New York County
Commission Expires March 30, 1978